

SERVED: April 27, 1993

NTSB Order No. EA-3860

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 7th day of April, 1993

JOSEPH M. DEL BALZO,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-10884
v.	)	
	)	
DAVID C. RIGSBY,	)	
	)	
Respondent.	)	
	)	

**OPINION AND ORDER**

Respondent, appearing pro se, has appealed from the initial decision issued by Administrative Law Judge Jerrell Davis at the conclusion of a hearing held in this case on January 11, 1991.<sup>1</sup> In that decision the law judge upheld the Administrator's order suspending respondent's private pilot certificate for 30 days based on his failure to maintain adequate clearance between his

---

<sup>1</sup> Attached is an excerpt from the hearing transcript containing the oral initial decision.

aircraft and a tree which he struck during a takeoff run from a dirt road, in alleged violation of 14 C.F.R. 91.9.<sup>2</sup> For the reasons discussed below, we affirm the law judge's decision.

On February 24, 1989, respondent, acting as pilot in command of a Cessna 182C with two passengers on board, attempted to take off from a 20-foot wide dirt road adjacent to a closed airport in Adelanto, California. During the takeoff ground run the left wing of his aircraft (which has a 36-foot wingspan) struck a tree. As a result, the nosewheel broke off and the aircraft was flipped upside down. The aircraft suffered substantial damage, but respondent and his passengers escaped unharmed.

On appeal, respondent does not challenge the law judge's finding that his conduct was careless, in violation of section 91.9. Rather, he argues that it was error for the law judge "to fail to exercise his discretion and apply the new enforcement policies stated by [the Administrator] on March 5, 1990." Respondent apparently believes that, pursuant to those policies his positive compliance disposition<sup>3</sup> should be given greater consideration, and his violation should be addressed by remedial

---

<sup>2</sup> Section 91.9 [now recodified as § 91.13(a)] provided:

**§ 91.9 Careless or reckless operation.**

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

<sup>3</sup> Respondent avers that he no longer uses non-designated surfaces for landings and takeoffs; that since this incident he has received additional instruction and obtained an instrument rating; and that he plans to obtain a commercial certificate.

training in lieu of this enforcement action. In respondent's view, these "new enforcement policies" constitute clear and compelling reasons to either reduce or eliminate the sanction in this case.<sup>4</sup>

In response, the Administrator argues that because the documents relied on by respondent containing statements of the FAA's enforcement policy were never offered or accepted into evidence, those documents should be stricken from the record.<sup>5</sup> In any event, the Administrator asserts, respondent was not eligible for the remedial training program, as that program applies only to cases which had not yet been opened or in which a notice of proposed certificate action (NOPCA) had not been issued before March 5, 1990. (Respondent was issued a NOPCA on July 6, 1989.) Moreover, the Administrator asserts that it is beyond the Board's authority to consider whether the Administrator should

---

<sup>4</sup> Respondent has attached to his brief copies of: 1) the Administrator's "General Aviation Compliance Program Briefing" delivered on March 5, 1990, recommending (among other things) implementation of a remedial pilot training program to be used as a compliance tool, and consideration of an airman's compliance disposition in determining enforcement action; 2) "Compliance/ Enforcement Bulletin No. 90-8," issued May 18, 1990, setting forth guidelines within which an FAA inspector may exercise his discretion to offer remedial training in lieu of initiating an enforcement action (applicable to cases opened on or after March 5, 1990 or cases in which no NPCA or civil penalty had been issued as of May 18, 1990); and 3) FAA Order No. 1000.9D, issued October 18, 1982, which states, in part: "No violation should go unredressed. Nor, however, should enforcement action be taken for the sake of punishment alone."

<sup>5</sup> In reply to the Administrator's motion to strike, respondent asserts that, since he was acting pro se, he did not know he had to formally move the documents into evidence, and asks the Board to excuse his procedural error.

have offered remedial training instead of pursuing an enforcement action in this case, as that decision constitutes an unreviewable exercise of his prosecutorial discretion.

Although the statements of FAA enforcement policy relied on by respondent were not formally introduced into evidence when they were discussed at the hearing, it is apparent from the record that the law judge considered them (see Tr. 60-1, 64, 74-5) and, accordingly, the Administrator's motion to strike those documents from the record is denied. However, the law judge apparently concluded, as do we, that those statements of policy provide no basis for reduction or elimination of the sanction in this case.<sup>6</sup> As we said in Administrator v. Foster, NTSB Order No. EA-2883 (1989), at 19, "the Board has no role in monitoring the Administrator's exercise of prosecutorial discretion." See also, Administrator v. Connaire, Inc., NTSB Order No. EA-2716 (1988) (it is not the Board's role to evaluate the Administrator's enforcement program; his selection of penalty is nonreviewable).

In sum, we agree with the law judge that the enforcement policy statements at issue in this case do not provide a clear and compelling reason to reduce the 30-day suspension sought in the Administrator's complaint. Respondent cites no Board precedent, and we are aware of none, to support a lower sanction

---

<sup>6</sup> Nothing in those statements requires the Administrator to offer remedial training in a particular case, or precludes him from pursuing an enforcement action against a respondent even though he has a positive compliance disposition.

in this case.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The 30-day suspension of respondent's pilot certificate shall commence 30 days after the service of this opinion and order.<sup>7</sup>

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

---

<sup>7</sup> For the purpose of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).